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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

In this month's Update, we examine some positive economic developments impacting employers during the past month in Australia. We consider the recent 10 per cent pay cut agreed by Arrium employees in South Australia, which is a significant development and one sure to have broader ramifications for employers and employees across the mining and manufacturing sectors. Finally, we discuss a recent unfair dismissal decision in which the Fair Work Commission ("FWC") made clear that employers must afford employees procedural fairness when terminating their employment; otherwise, they may be found to have unfairly dismissed an employee (even in the face of clear evidence of employee misconduct).

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ECONOMIC DEVELOPMENTS

OVERALL WAGES INCREASES BY 3.0 PER CENT IN ENTERPRISE AGREEMENTS APPROVED IN JUNE QUARTER 2016

A report released by the Department of Employment summarising overall wages growth under federal enterprise agreements has revealed that the average annualised wage increase ("AAWI") for agreements approved in the June quarter of 2016 was 3.0 per cent, up from 2.7 per cent in the previous quarter. The AAWI for private sector enterprise agreements approved in the same period was 3.1 per cent. These calculations are based on the 69.4 per cent of agreements approved in the June quarter of 2016 that contained identifiable wage increases.

RBA DISCUSSION PAPER CITES INCREASE IN THE SHARE OF LABOUR MARKET ADJUSTMENT DUE TO CHANGES IN AVERAGE HOURS WORKED IN AUSTRALIA

A Discussion Paper published by the Reserve Bank of Australia ("RBA") titled *Jobs or Hours? Cyclical Labour Market Adjustment in Australia* has found that the contribution of changes in average hours worked to labour market adjustment in Australia has increased threefold over the last 20 years. This means that rather than adjusting the number of employees (through redundancies) in response to economic downturns, employers are increasingly choosing to adjust the number of hours worked by employees. This trend has not been observed in other major advanced economies and as a result, the authors suggest it might be explained by "either the reduction in the severity of downturns or labour market reforms (or both)" experienced in Australia.

For instance, during the 2008–2009 downturn, there were fewer adjustments via redundancies than expected, considering the widespread global effects of the Global Financial Crisis. The RBA suggests this was due to a combination of factors, including: (i) the fact that the labour market was very tight in the lead-up to the downturn, with unemployment at record low levels; (ii) the heightened uncertainty surrounding economic conditions during this time, which made employers reluctant to hire or fire; and (iii) the pessimistic views of future unemployment prospects, which made workers more willing to accept longer working hours in return for job security. There is also an acknowledgment in the Discussion Paper that the flexibility of the industrial relations regime in Australia may have facilitated this shift, by making it simpler for employers to bargain directly with employees over matters like wages and working hours.

IN THE PIPELINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

ARRIUM WORKERS AGREE TO 10 PER CENT PAY CUT AS ADMINISTRATOR SEEKS TO SECURE THE COMPANY'S FUTURE

Workers at embattled steelmaking and iron ore mining company Arrium have accepted a new enterprise agreement that provides for a 10 per cent pay cut. Arrium entered voluntary administration in April of this year and since that time, there have been around 250 job losses coupled with reductions in hours for the remaining employees at the Whyalla steelworks and iron ore mine in South Australia. The enterprise agreement was negotiated by union representatives and put to a formal vote before approximately 1,600 workers this month. It was the second time the agreement had been presented to employees, after it was narrowly rejected in late August 2016. The previous enterprise agreement expired at the end of August 2016.

The new enterprise agreement, which runs for four years, contains a 10 per cent pay cut in the first year, a pay freeze in the second year and 3 per cent increases in the third and fourth years. The agreed pay cut is intended to provide greater security for the workforce and assist administrators in attracting a new buyer for the business (possibly from overseas). Indeed, it has been regarded by the administrators as a critical part of the sale process. Meanwhile, both major political parties have pledged to provide financial support to the company to ensure the survival of the mining industry in South Australia.

HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

FAIR WORK COMMISSION PRESIDENT FLAGS POSSIBLE USE OF LOADED AWARD RATES IN LIEU OF PENALTY RATES AND OVERTIME PAY

Ahead of the long-awaited decision of the FWC on weekend penalty rates in the retail and hospitality sectors (which is not expected to be handed down before November 2016), the president of the Commission has laid out a proposal that could strike a balance between the rights of employers and employees in relation to what has become a very contentious issue. The proposed plan would enable employers covered by the retail award to pay employees "loaded rates" of pay if the employee agrees to forgo penalty rates and overtime. Justice Iain Ross cited an existing clause in the *Hospitality Industry (General) Award 2010* (clause 27.1) that provides for agreements between employers and employees to pay a loaded rate (their weekly rate plus 25 per cent) in lieu of penalty rates and overtime entitlements. There has already been a positive response to these proposals from small business representatives, who regard the introduction of flexible arrangements as a necessary response to what many see as an overcomplicated award system.

FORMER EMPLOYEE BRINGS SUCCESSFUL UNFAIR DISMISSAL CLAIM, DESPITE EVIDENCE OF MISCONDUCT IN ACCESSING AND DOWNLOADING PORNOGRAPHIC MATERIAL ON A WORK COMPUTER

Factual Background. The applicant, Mr Croft, had been employed by Smarter Insurance Brokers Pty Ltd ("Smarter Insurance") as a General Insurance Manager for just over 12 months. The employment relationship was strained from the outset due to perceived personality conflicts between the applicant and the company's directors. Apparently a number of verbal warnings were issued in late 2015 arising from dissatisfaction with Mr Croft's performance and conduct; however, no written warnings were ever issued. On 27 January 2016, Mr Croft attended a meeting with one of the company directors where he was informed he was being dismissed with four weeks' pay in lieu of notice. The employer purportedly dismissed Mr Croft pursuant to clause 21 of his employment contract, which provided for termination of the employee's employment with four weeks' notice, or payment in lieu of notice. The applicant filed an application with the FWC for an unfair dismissal remedy.

Legal Background. Under section 385 of the *Fair Work Act 2009* (Cth) ("FWA"), a person has been unfairly dismissed if the FWC is satisfied of all of the following: (i) the person has been *dismissed* (per the definition of "dismissed" in section 386); (ii) the dismissal was *harsh, unjust or unreasonable* (per the criteria in section 387); (iii) the dismissal was *not consistent with the Small Business Fair Dismissal Code*; and (iv) the dismissal was *not a case of genuine redundancy* (per the definition in section 389).

The criteria for considering harshness in section 387 include such factors as: (i) whether there was a valid reason for the dismissal related to the person's capacity or conduct; (ii) whether the person was notified of that reason and given an opportunity to respond; (iii) any unreasonable refusal by the employer to allow a support person to be present at discussions related to the dismissal; (iv) whether the person had been warned about unsatisfactory performance before the dismissal (if applicable); and (v) the degree to which the size of the employer's enterprise and the absence of dedicated human resource management would likely affect the dismissal procedures followed.

The Small Business Fair Dismissal Code ("Code") applies to small business employers (those with fewer than 15 employees). It requires that an employer who intends to dismiss an employee take steps to: (i) give the employee a valid reason why they are at risk of dismissal; (ii) warn the employee in writing (or verbally) of the risk of dismissal if there is no improvement; (iii) provide an opportunity to respond to the warning and a reasonable chance to rectify the problem; and (iv) before dismissing the employee, inform them of the reason for the dismissal. In addition, it requires that employers keep records of warnings issued to the employee or of discussions on how their conduct or performance could be improved.

Decision. The applicant argued that Smarter Insurance had failed to comply with the Code in dismissing him and that the dismissal was harsh, unjust or unreasonable under section 387 of the FWA. The applicant claimed that he had never been provided with any verbal or written warnings as mandated by the Code. He also claimed that he had never been informed of any issues with his conduct or performance until the 27 January 2016 meeting when he was dismissed. In response, the employer claimed that there had been a valid reason for Mr Croft's dismissal related to his capacity or conduct (per section 387(a) of the FWA). The employer conceded that the dismissal may not have been implemented in strict compliance with the Code, but any deficiencies in procedural fairness did not alter the fact that it had valid reasons to terminate Mr Croft's employment.

Smarter Insurance was a small business and so was governed by the Code. The FWC closely examined the Code and whether Smarter Insurance had complied with it in dismissing Mr Croft. It held that that the employer likely dismissed Mr Croft for "some other reason" (item 9 of the Code) but that even so, it was still required to give Mr Croft warning that his employment was at risk, an opportunity to rectify the problem, a further reason as to why he was being dismissed and an opportunity to respond to the dismissal. In this case, no such notice or opportunity to respond was provided to Mr Croft.

In examining whether the dismissal was "harsh, unjust or unreasonable", the FWC noted that clause 21 of the employment contract did not give the employer a contractual right to dismiss Mr Croft at will. Looking at the alleged performance and conduct issues, the FWC noted that the applicant's relationship with the company had become fractious due to a number of conduct issues (including his regular late arrival for work and extended lunch breaks). However,

without documented evidence that the employer had advised Mr Croft that he risked being dismissed if they were not rectified, the employer had no "sound and defensible basis for dismissal".

Finally, the FWC considered the employer's argument that Mr Croft had engaged in misconduct that justified dismissal when he accessed, downloaded and stored pornographic material on an employer-provided mobile phone and laptop. Mr Croft did not deny that he had accessed the material but claimed he had done so during lunch breaks or outside of work hours and not on work premises. The FWC observed that "[o]rdinarily, the use of employer provided equipment to access, download and/or store hard core pornographic material would represent misconduct". However, on the facts, the FWC held there was no evidence that Smarter Insurance had circulated a policy limiting the use of employer-provided equipment to work-related activities. In addition, the FWC noted that the material was accessed and/or downloaded on only three occasions.

For these reasons, the conduct was not characterised as serious misconduct that would have justified summary dismissal. As a result, it was held that Mr Croft had not been dismissed for a valid reason relating to his capacity or conduct under section 387(a) of the FWA. In addition, the FWC found that the employer's conduct fell short of the other factors in section 387. In this regard, it described the dismissal as harsh, unjust and unreasonable and "severely flawed" in its execution, as it had the effect of denying Mr Croft any opportunity to respond to the underlying reasons for his dismissal. The FWC ordered that compensation was an appropriate remedy (and that reinstatement would be inappropriate) and ordered that the employer pay Mr Croft the equivalent of eight weeks' pay ($10,000).

Lessons for Employers. Employers must ensure they have up-to-date workplace policies regarding the use of work-provided equipment which confine the usage of such equipment to work-related activities and also prohibit the accessing of explicit or offensive material. Such policies should be reviewed, updated and disseminated on a regular basis. Further, small businesses must ensure they comply with the Small Business Fair Dismissal Code whenever they intend to dismiss an employee (including in the case of a genuine redundancy) to protect against potential unfair dismissal claims. In this case, the Code was not treated merely as a set of guidelines but as strict requirements that the employer was required to meet in order to counter the unfair dismissal claim. Small business employers must also ensure they maintain adequate records (including file notes from meeting and employee correspondence) so that they can provide evidence of compliance with the Code.

We thank Claire Goulding for her assistance in the preparation of this Update.

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